APPELLANT PRO SE:

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ATTORNEYS FOR APPELLEE:

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# IN THE
# COURT OF APPEALS OF INDIANA

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| RICHARD COWART, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0607-PC-568 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William T. Robinette, Commissioner
Cause No. 49G03-0006-PC-90308

**September 17, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-petitioner Richard Cowart appeals from the denial of his petition for post-conviction relief. Cowart argues that the trial court erroneously dismissed his motion to dismiss, that he received the ineffective assistance of both trial and appellate counsel, and that one of his convictions violates double jeopardy. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

The underlying facts, as described briefly in Cowart's second direct appeal, are as follows:

> On May 31, 2000, Cowart's wife, Jennifer, was looking for a tool in the trunk of his car and discovered pictures of her then five-year-old daughter, A.C., posing nude and engaging in various sex acts with Cowart. In one picture, the couple's three-year-old daughter was also present.

Cowart v. State, No. 49A02-0204-CR-268, slip op. at 2 (Ind. Ct. App. Feb. 14, 2003) ("Cowart II").

On June 5, 2000, the State charged Cowart with class D felony child exploitation, two counts of class A felony child molesting, class D felony dissemination of matter harmful to minors, and class A misdemeanor possession of child pornography. At the initial hearing, the trial court scheduled the omnibus date to be July 17, 2000.

On January 24, 2001, at a pretrial conference, Cowart's attorney orally moved to dismiss the two child molesting counts, arguing that Indiana Code section 35-42-4-3 violates the Equal Protection Clause of the United States Constitution and the Equal Privileges

provision of the Indiana constitution.[1] A written motion to dismiss raising the same arguments was filed on January 26, 2001 (the first motion to dismiss),[2] at which time the trial court held a hearing and denied the motion. The trial court later certified the issues in Cowart's first motion to dismiss for interlocutory appeal. On October 18, 2001, a panel of this court considered the interlocutory appeal and concluded that Indiana Code section 35-42-4-3 does not violate the State or federal constitution. Cowart v. State, 756 N.E.2d 581, 587 (Ind. Ct. App. 2001) ("Cowart I"). Our Supreme Court denied transfer on January 17, 2002. Cowart v. State, 774 N.E.2d 505 (Ind. 2002).

On February 19, 2002, the day on which Cowart's bench trial began, he filed a second motion to dismiss, arguing that

> the statute as applied to him violates his rights to due process and equal protection as guaranteed by the United States Constitution; the Equal Privileges, proportionality clause, and prohibition of vindictive justice contained in the Indiana constitution; and the separation of powers doctrine.

Cowart II, slip op. at 3. The following exchange occurred at the beginning of the trial:

> The Court: . . . I've got a Defendant's Second Motion to Dismiss that was filed just this morning. Tell me a little bit about your Motion, sir . . .
>
> [Cowart's attorney]: Your Honor, it addresses constitutional issues not covered in his previous Motion to Dismiss. Mr. Cowart is the author of the Motion. I—I spruced it up a little bit, cleaned it up a little bit. Corrected some of the cites. And it—it does cover other issues not previously covered. We—we realize that the State obviously wouldn't have a chance to respond to it, and so it—would request that the State be given time to respond and the Court take it under advisement until

[1] On October 30, 2000, Cowart had filed a pro se motion to dismiss, which the trial court denied on the same day. The October 30, 2000, motion to dismiss is not included in the record on appeal.

[2] The January 26, 2001, motion to dismiss is not included in the record on appeal.

> some time after the trial if need be. We believed it needed to be filed before trial though.
>
> The Court: I understand—to preserve any issues. All right, well, I'll take a look at this.
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> [Cowart's attorney]: I think . . .
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> The Court: I'll show it under advisement, and I'll review it as we proceed . . . .

PCR Ex. p. 35-36. The State did not object. At the end of the one-day bench trial, the trial court denied the motion.

At the conclusion of the trial, the trial court found Cowart guilty of one count of child molesting, child exploitation, and possession of child pornography. It acquitted Cowart of the remaining count of child molesting and found that the dissemination count merged into the child molesting conviction. On March 20, 2002, the trial court sentenced Cowart to fifty years for child molesting, three years for child exploitation, and one year for possession of child pornography, to be served concurrently.

Cowart pursued a second direct appeal, arguing that the trial court had erroneously denied his second motion to dismiss and that the sentences imposed were inappropriate in light of the nature of the offenses and his character. As for the constitutional arguments raised in the second motion to dismiss, we concluded that "Cowart was required to raise all constitutional grounds in his first motion to dismiss." Cowart II, slip op. at 5. We held that by failing to raise the arguments in his first motion to dismiss, Cowart waived consideration thereof on appeal. Id. We also found that the sentences were not inappropriate. Id. at 6.

On December 20, 2004, Cowart filed a pro se petition for post-conviction relief, raising constitutional challenges to the child molesting statute and arguing that he was denied his right to appeal a final judgment, that he received the ineffective assistance of trial and appellate counsel, and that his conviction for possession of child pornography violated double jeopardy principles. Following a hearing that began on January 26, 2006, the post-conviction court denied Cowart's petition on June 15, 2006. Cowart now appeals.[3]

## DISCUSSION AND DECISION

### I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

[3] We are entering an order contemporaneously with this decision denying Cowart's motion to strike portions of the State's brief.

## II. Motions to Dismiss

Cowart first argues that the trial court erroneously denied his motions to dismiss and he again contests the constitutionality of the child molesting statute. In Cowart I, we found that Indiana Code section 35-42-4-3 is constitutional. 756 N.E.2d at 587. And in Cowart II, we found that, to the extent Cowart's second motion to dismiss raised new constitutional challenges to the statute, he had waived those arguments by failing to raise them in his first motion to dismiss. Slip op. at 5.

Any arguments regarding the propriety of the trial court's rulings on Cowart's motions to dismiss and the constitutionality of the child molesting statute have already been raised on direct appeal and decided against Cowart. Issues that were raised on direct appeal are not available in post-conviction proceedings. Woods v. State, 701 N.E.2d 1208, 1213 (Ind. 1998). Although Cowart may find fault with the way in which the Cowart II court dispensed with his claim, he is not entitled to a second bite at the apple. Thus, we decline to address these issues again.

## III. Assistance of Counsel

Cowart next argues that he received the ineffective assistance of both trial and appellate counsel, contending that his trial counsel was ineffective for failing to properly file the second motion to dismiss and that his Cowart II appellate counsel was ineffective for deciding to focus on the constitutionality of the child molesting statute as the primary issue on appeal.

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

We will not lightly speculate as to what may or may not have been an advantageous trial strategy, as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998). If a claim of ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

A. Trial Counsel

Cowart argues that his trial counsel was ineffective for failing to include the arguments raised in the second motion to dismiss as part of the first motion to dismiss. We will briefly consider the arguments raised in the second motion to dismiss to determine whether Cowart suffered prejudice as a result of the failure to include the arguments in the

first motion, which led to a waiver of the arguments on appeal. Our Supreme Court has held that "[w]hen considering the constitutionality of a statute, we begin with the presumption of constitutional validity, and therefore the party challenging the statute labors under a heavy burden to show that the statute is unconstitutional." State v. Moss-Dwyer, 686 N.E.2d 109, 112 (Ind. 1997).

1. Cruel and Unusual Punishment

Cowart first turns to Article 1, Section 16 of the Indiana Constitution and the Eighth Amendment to the United States Constitution, arguing that the punishment imposed by the child molesting statute—Indiana Code section 35-42-4-3—is cruel and unusual because it treats offenders over the age of twenty-one more harshly than those under the age of twenty-one.

A legislatively determined penalty will be deemed unconstitutional by reason of its length only if it is "so severe and entirely out of proportion to the gravity of the offense committed as 'to shock public sentiment and violate the judgment of reasonable people.'" Teer v. State, 738 N.E.2d 283, 290 (Ind. Ct. App. 2000) (quoting Cox v. State, 203 Ind. 544, 181 N.E. 469 (1932)).

Indiana Code section 35-42-4-3 provides, in relevant part, that a person who performs or submits to sexual intercourse or deviate sexual conduct with a child under fourteen years of age commits a class B felony. I.C. § 35-42-4-3(a). The offense, however, becomes a class A felony if the offender is at least twenty-one years of age. Id. at § -3(a)(1).

In analyzing the propriety of the statute pursuant to Article 1, Section 23 of the Indiana Constitution in Cowart I, we concluded that increased punishment for child molesters who are at least twenty-one years old was reasonably related to the inherent characteristics that distinguish the two age groups at issue:

> Under this statute, there are two age classifications, those individuals under the age of twenty-one and those who are at least twenty-one years old. As stated above, individuals who have attained the age of twenty-one are likely to have a greater maturity level and understanding for the consequences of their actions. The age twenty-one classification dividing line also accommodates, to some extent, high school and college age dating relationships. Cowart's argument that those individuals who are at least twenty-one years old are "similarly situated" to those who are less than twenty-one years old and commit the same conduct is rather disingenuous in light of the twenty-nine year age difference between himself and the alleged victim in this case.

Cowart I, 756 N.E.2d at 585-86 (internal citation omitted). Given that the legislature could have reasonably reached the same conclusions as the Cowart I court, we find that Indiana Code section 35-42-2-3 does not shock public sentiment or violate the judgment of reasonable people. Similarly, under the Eighth Amendment to the United States Constitution, we find that the sentences imposed by this statute are not grossly disproportionate to the crime. See Solem v. Helm, 463 U.S. 277, 288 (1983) (holding that the Eighth Amendment prohibits extreme sentences that are grossly disproportionate to the crime).

2. Separation of Powers

Essentially, Cowart next contends that Indiana Code section 35-42-2-3 violates the requirement of separation of powers as set forth in the Indiana and United States Constitutions. It is axiomatic that determining the appropriate sentence for a crime is a

function properly exercised by the legislature. Moss-Dwyer, 686 N.E.2d at 111-12. On the other hand, it is the trial court's responsibility to "fix the penalty of and sentence a person convicted of an offense." Ind. Code § 35-50-1-1. Cowart argues that by enhancing child molesting to a class A felony for those offenders over the age of twenty-one, the legislature has impermissibly determined the penalty "for a person convicted of a crime." Appellant's Br. p. 40 (emphasis in original). By drawing a line between offenders under the age of twenty-one and those over it, the legislature has determined the penalty for a class of people convicted of a crime, not for a person. If the legislature had included Richard Cowart's name in the statute, he would have a credible argument. As the statute is actually written, however, he does not. Consequently, the child molesting statute does not violate the separation of powers doctrine.

3. Vindictive Justice

Article 1, Section 18 of the Indiana Constitution provides that "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice." Cowart contends that enhancing a crime based on the offender's age "is the purest form of vindictive justice." Appellant's Br. p. 40. Our Supreme Court has held, however, that "individual applications are not reviewable under Article 1, Section 18 because Section 18 applies to the penal code as a whole and does not protect fact-specific challenges." Ratliff v. Cohn, 693 N.E.2d 530, 542 (Ind. 1998) (emphasis in original). Consequently, this challenge fails.

4. Special Laws

Cowart next directs our attention to Dowd v. Stuckey, 222 Ind. 100, 51 N.E.2d 947 (1943), as support for his argument that the child molesting statute is an impermissible special law. He also relied on Dowd in Cowart I, however, and that panel concluded that Dowd lends no support to Cowart's position:

> In his argument, Cowart relies primarily on Dowd v. Stuckey, 222 Ind. 100, 104, 51 N.E.2d 947, 948 (1943), in which our supreme court considered a statute which provided that if a "person upon parole from this institution for younger prisoners [the Indiana Reformatory] is found guilty of a new crime, he shall serve his original sentence before serving the new sentence, while one who was convicted first when he was above the age of thirty, and who is convicted of a new crime while on parole, shall serve the sentences concurrently." Dowd, 222 Ind. at 104, 51 N.E.2d at 948.
>
> In Dowd, our supreme court found that there was "no rational basis for the discrimination against, and heavier penalties, for those in the lower age group." Id. The State suggested that members of the younger group were more susceptible to reformation and there was a justification for threatening them with greater penalties. Id. at 104, 51 N.E.2d at 948. The court found that there was no rational basis for punishing younger offenders more severely than older offenders and concluded that there was a sound basis for the opposing view that penalties should be less severe for younger individuals found guilty of crimes. Dowd, 222 Ind. at 105, 51 N.E.2d at 948.
>
> Dowd does not support Cowart's argument here. In fact, Cowart is making precisely the opposite argument from that put forward by the youthful offender in Dowd. Cowart is arguing that an older and arguably more mature person found guilty of child molesting should not be punished more severely than a younger person found guilty of the same conduct. In Dowd, our supreme court clearly recognized that age classifications may be proper, even though the age classification in the statute at issue in Dowd was unconstitutional, and expressed the belief that penalties should be less severe for younger offenders. This is precisely what the statute at issue in this case, Indiana Code section 35-42-4-3, does.

Cowart I, 756 N.E.2d at 585. Inasmuch as this court has already found that Dowd is no help to Cowart, and inasmuch as Cowart's only support for the special laws argument is Dowd, this argument must fail.

Cowart also essentially makes the same argument couched in different terms—that the child molesting statute is not a general law as required by Article 4, Section 23 of the Indiana Constitution. We have just concluded, however, that Cowart has failed to establish that the statute is a special law. The logical corollary to that conclusion is that Cowart has failed to overcome the presumption that the child molesting statute is a constitutional, general law. Consequently, this argument must also fail.

5. Substantive Due Process

Finally, Cowart contends that the distinction between over- and under-twenty-one-year-old offenders in the child molesting statute violates substantive due process as provided for by the Fifth and Fourteenth Amendments to the United States Constitution. Substantive due process prohibits state action that deprives one of life, liberty, or property without a rational basis for the deprivation. Teer, 738 N.E.2d at 289.

In the context of an Equal Protection challenge, the Cowart I court concluded that there is a rational basis for the age-based distinction contained in the child molesting statute:

> We believe that the General Assembly could properly conclude that individuals who are at least twenty-one years old are more mature and have a greater understanding of the consequences of their actions than eighteen-year olds. Also, where there is a wider age disparity between the victim and the perpetrator, there is a greater likelihood that the victim will acquiesce in the perpetrator's sexual overtures because of misplaced confidence or fear of the perpetrator. We therefore hold that the age classification at issue in this case is rationally related to one of

> the highest and most legitimate state interests: the protection of children.

Cowart I, 756 N.E.2d at 586. The same analysis applies to Cowart's substantive due process challenge, and we hereby conclude that there is a rational basis for the distinction based on the age of the offender in the child molesting statute such that it does not violate substantive due process.

Inasmuch as we have found that there is no merit to any of Cowart's constitutional challenges to the child molesting statute, we find that he was not prejudiced as a result of his trial counsel's failure to file the challenges in a timely fashion. Consequently, Cowart has failed to establish that he received the ineffective assistance of trial counsel.

B. Appellate Counsel

Cowart next argues that he received the ineffective assistance of appellate counsel in Cowart II because his attorney dedicated the majority of the appellate brief to arguments that this court found had been waived.

Claims of ineffective assistance of appellate counsel are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). These claims generally fall into three categories: (1) denying access to the appeal, (2) waiver of issues, and (3) failure to present issues well. Id. at 193-95. The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Id. at 193. Thus, ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id.

To show that counsel was deficient for failing to raise an issue on direct appeal, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000), cert. denied, 534 U.S. 1164 (2002). In evaluating the performance prong of appellate counsel's performance, we examine whether the unraised issues are significant and obvious from the record and whether the unraised issues are "clearly stronger" than the issues that were presented. Bieghler, 690 N.E.2d at 194. The reviewing court must consider the totality of an attorney's performance to determine whether the client received constitutionally adequate assistance, and "should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made." Id.

The only argument that Cowart insists his appellate attorney should have raised in lieu of the argument that we found was waived relates to Cowart's convictions for child exploitation and possession of child pornography. According to Cowart, these convictions violate double jeopardy; consequently, he contends that his appellate counsel was ineffective for failing to raise the challenge in his direct appeal.

Our Supreme Court has outlined a two-part test to determine whether two convictions violate Indiana's double jeopardy provision. Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1999). First, we evaluate whether the statutory elements of the crimes are the same. Robinson v. State, 835 N.E.2d 518, 532 (Ind. Ct. App. 2005). Second, we evaluate whether

the actual evidence used to convict the defendant of the two crimes is the same. Id. Under the actual evidence test, the appellant must show a reasonable probability that the facts used by the factfinder to establish the essential elements of one offense were also used to establish the essential elements of the second offense. Id. The appellant must show more than a remote or speculative possibility that the same facts were used. Id.

Turning first to the statutory elements of the crimes, a person commits child exploitation when he knowingly or intentionally "photographs . . . any performance or incident that includes sexual conduct by a child under eighteen (18) years of age . . . ." Ind. Code § 35-42-4-4(b)(1). And a person commits possession of child pornography when he knowingly or intentionally possesses a photograph "that depicts or describes sexual conduct by a child who the person knows is less than sixteen (16) years of age or who appears to be less than sixteen (16) years of age, and that lacks serious literary, artistic, political, or scientific value . . . ." Id. at § -4(c)(3).

Looking only to the statutory elements of these offenses, it is apparent that each of these statutes requires proof of an additional fact that the other does not. Pursuant to section 4(b)(1), Cowart was required to engage in the act of photographing an incident that included sexual conduct by his five-year-old daughter. Pursuant to section 4(c)(3), Cowart was required to be in physical possession of a photograph that depicts sexual conduct by his five-year-old daughter. To commit child exploitation, he need not have printed the photographs. To commit possession of child pornography, he need not have taken the photos himself. Consequently, these two convictions do not violate the statutory elements test.

As to the actual evidence test, we observe that the charging information includes the following descriptions of the relevant charges:

> COUNT III
>
> On or between July 14, 1998[,] and July 14, 1999, Richard Cowart, did knowingly or intentionally photograph a performance or incident that included sexual conduct, that is: exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, by a child under eighteen (18) years of age, namely: [A.C.], five (5) years old;
>
> ***
>
> COUNT V
>
> On or about May 31, 2000, Richard Cowart, did knowingly or intentionally possess pictures that depict sexual conduct of children who appear to be less than sixteen (16) years of age and lack any serious [literary], artistic, political or scientific value . . . .

PCR Ex. p. 156. In entering a judgment of conviction on Count V, the trial court explicitly observed that Count V is premised on "the possession of the photographs on a different date" than the date on which Cowart was alleged to have taken the photographs; consequently, the possession "offense [is] distinctive itself as far as the commission date." PCR Ex. p. 103. Similarly, Cowart's appellate counsel informed his client that he decided not to challenge Count V because, among other things, the trial court "stated that he was convicting you based on the possession of the pictures of [A.C.] on a different date from the date the pictures were taken." Id. at 330. We agree with the trial court and Cowart's appellate attorney—the actual evidence used to convict Cowart of these two offenses was not the same, inasmuch as the offenses occurred on different dates and were separated by as many as two years.

Consequently, Cowart has failed to establish that his appellate attorney was ineffective for declining to raise this argument in his direct appeal.

IV. Freestanding Challenges to Count V

Finally, Cowart raises two direct challenges to Count V—a double jeopardy challenge and an argument regarding the evidence forming the basis of this charge. Initially, we observe that the purpose of a petition for post-conviction relief is to raise issues unknown or unavailable to a defendant at the time of the original trial and appeal. Taylor v. State, 840 N.E.2d 324, 330 (Ind. 2006). Our Supreme Court has cautioned that it is "wrong" for this court to entertain freestanding claims of fundamental error on appeal. Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002). Consequently, Cowart's freestanding claims of error regarding his conviction for possession of child pornography are foreclosed on post-conviction review. Id.

Waiver notwithstanding, we note that we have already concluded that this conviction does not violate double jeopardy. Cowart's other argument assumes that when the State charged him with Count V, it based the charge on his possession of twenty-five photographs that were later suppressed. As his appellate attorney observed, however, "[t]he charging information does not specify that the charge was based on the suppressed photographs . . . ." PCR Ex. p. 330. We agree. Consequently, this argument must fail.

The judgment of the post-conviction court is affirmed.

BAILEY, J., and VAIDIK, J., concur.